DA 09-0500

IN THE SUPREME COURT OF THE STATE OF MONTANA

* *

LON PETERSON,

Plaintiff/Appellant and Cross-Appellee,

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Defendant/Appellee and Cross-Appellant.

* *

PLAINTIFF/APPELLANT and CROSS-APPELLEE PETERSON'S REPLY BRIEF IN SUPPORT OF OPENING BRIEF AND RESPONSE TO DEFENDANT/APPELLEE and CROSS-APPELLANT'S CROSS-APPEAL

* *

On Appeal from the District Court of the Eighth Judicial District
Hon. Julie Macek

* *

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RESTATEMENT OF THE CASE

Peterson was forced to file a lawsuit against Omimex because, even though it secretly determined in its claims file that Lindberg was at least 50% negligent (and as much as 70%), St. Paul completely denied any and all liability. St. Paul violated the intent and purpose of the UTPA by forcing unnecessary litigation in a case where it knew its insured was admittnedly liable for at least half of Peterson's damages, as a matter of law, under Montana's comparative negligence statute.

After three years of denying any liability so that it could earn interest by hanging onto its $850,000, St. Paul finally consented to an unconditional judgment, rather than an ordinary "settlement," which judgment constituted an admission of Lindberg's liability.

The jury found in favor of St. Paul in Peterson's subsequent bad faith case because the District Court committed several critical legal and evidentiary errors which prevented Peterson from receiving a fair trial. The District Court allowed St. Paul to blame its attorney, Gregoire, for its claims handling without advising the jury of Gregoire's legal role as St. Paul's agent. If Montana's UTPA is to have any vitality at all in anything other than 100% liability rear-end motor vehicle accident cases, the District Court's legal and evidentiary errors must be corrected and this case remanded for a new trial.

RESTATEMENT OF RELEVANT FACTS

St. Paul's statement of facts blatantly ignores the facts contained in "the

investigative reports, evaluations and correspondence" in its own claims file. *See, Graf v. Continental Western Ins. Co.,* 2004 MT 105, 89 P.3d 22, 27 ¶ 17. Lindberg's own recorded statement taken by Allums admitted he was driving as fast as 55 mph and he never slowed down at all before impact. St. Paul's own file admits Peterson was driving only 10-15 mph. (Pl's Exh. 29; TR 257-58).

Notwithstanding Lindberg's "beliefs" about his position on the roadway, Gregoire concluded a jury would find him at least 50%, and as much as 70%, liable for the accident. (Pl's Exh. 35; TR 312-14). Despite Lindberg's thumb injuries, Gregoire still concluded he was negligently distracted and inattentive because of the ringing cell phone. (Pl's Exh. 27; TR 307-08). Even though Lindberg denied using or reaching for the cell phone, Gregoire still determined in the claims file that his negligence was 50% or greater. (Pl's Exh. 35). Because of the District Court's failure to attribute Gregoire's admissions to St. Paul, however, St. Paul was permitted to completely deny Lindberg's liability.

Allums' determination that no citations were given did not prevent Gregoire from finding Lindberg at least 50% liable and convincing St. Paul to allow an $850,000 judgment. (TR 328). Even after Denny Lee adopted the most favorable of his four different "centerline" scenarios, Gregoire still concluded a jury would not find Peterson more than 50% negligent. (Pl's Exh. 65; TR 314-16). Gregoire, therefore, concluded Peterson was legally entitled

to at least half his damages, but St. Paul hid such entitlement from Peterson for three years.

Peterson was prevented, by the District Court's order granting summary judgment, from presenting any "evidence" that Gregoire acted as St. Paul's agent, which allowed St. Paul to deny liability while, at the same time, Gregoire admitted liability. (CR 98). At the time Gregoire was hired, St. Paul instructed he could "not take any actions in connection with the handling of [the] lawsuit, unless you have our specific authorization." (Pl's Exh. 19; TR 265-67). The facts, therefore, supported Peterson's position that Gregoire was St. Paul's agent, but the District Court erred in completely failing and refusing to give any jury instructions on the agency issue.

By admitting, on St. Paul's behalf, that Lindberg's negligence was at least 50%, and as great as 70%, Gregoire should not have been permitted to also opine that Lindberg's liability was "disputed" and testify that the $850,000 was paid for some "other" reason. Under Montana's comparative negligence statute, Lindberg's 50% negligence made St. Paul liable, as a matter of law, for at least half of Peterson's damages. *See, Marry v. Missoula County*, 866 P.2d 1129 (Mont. 1993). By refusing to so rule and instruct the jury, the District Court allowed St. Paul to improperly deny the undeniable.

Regardless of the underlying reason for Gregoire's determination that Lindberg was 50-70% negligent (cell phone, speed, centerline, foreign corporation, local farmer, serious injuries, etc.), the jury was never told, and

Peterson was illegally prevented from arguing, that such negligence constitutes reasonably clear liability, as a matter of Montana law. Even if there was no evidence of Lindberg's cell phone use and it was a "nonissue," Gregoire still determined a jury would find Lindberg 50-70% negligent and Peterson would not be found more than 50% negligent. Even if the speed and centerline issues were contested, St. Paul's claims file still admitted a jury would determine Lindberg was more negligent than Peterson.

St. Paul's claims file did not relegate Lindberg's 50-70% negligence to a mere possibility. Gregoire reported that a jury "will" assign 50-70% negligence to Lindberg and that Peterson would be entitled to 50-70% of his damages. (Pl's Exh. 35; TR 312-14). Without any instruction or ruling from the District Court that Lindberg's 50% negligence constituted liability and "reasonably clear" liability, as a matter of law, St. Paul was improperly permitted to disavow what it and Gregoire had admitted in the claims file.

St. Paul did not "settle" Peterson's claim. Peterson did not sign any settlement release in which St. Paul was permitted to deny liability. (Pl's Exh. 92; TR 280-81). Instead, Peterson demanded that St. Paul offer judgment so St. Paul could not deny liability. St. Paul's Offer of Judgment and the Judgment subsequently entered did not contain any denial of liability, such as that contained in a standard settlement agreement. (TR 281).

When St. Paul first moved for summary judgment, arguing that liability was not reasonably clear, as a matter of law, it had not yet produced its claims

file. (CR 10). Because the subsequently produced claims file admitted Lindberg was 50% or more negligent and, therefore, liable, as a matter of law, the District Court could not have granted St. Paul's "renewed" Motion for Summary Judgment.

SUMMARY OF ARGUMENT

Giambra v. Travelers Indemnity Company, 2003 MT 289, 79 P.3d 880 (Mont. 2003), could not have established any "standard" for defining "reasonably clear liability" in a UTPA case because it was a declaratory judgment action for *Ridley* payments, wherein the insurer had not yet produced its claims file. As held in *Graf ,* the contents of the claims file are critical in determining the propriety of the insurer's handling of the claim.

Where, as here, Gregoire documented the claims file by admitting Lindberg's liability, as a matter of law, under Montana's comparative negligence statute, such admitted liability must also constitute "reasonably clear" liability, as a matter of law, under the UTPA and there can be no reasonable basis in law or fact for completely denying the claim. The District Court erred in ruling otherwise.

Contrary to St. Paul's argument, Peterson did not request a ruling that reasonably clear liability existed in this case, as a matter of law. It was up to the jury to decide whether Gregoire's admissions in the claims file supported 50-70% negligence against Lindberg or 80-90% negligence against Peterson. The District Court's error was in not providing the jury with the legal standard

to be applied in determining reasonably clear liability and in also preventing and precluding Peterson from arguing the legal effect of the comparative negligence statute.

In this case, St. Paul denied any and all liability, despite Gregoire secretly admitting in the claims file that Lindberg was 50-70% negligent. St. Paul then allowed an adverse judgment on liability, which is the antithesis of a denial of all liability. Whereas liability was reasonably disputed in *Giambra*, the adverse judgment against St. Paul was at least evidence of reasonably clear liability when St. Paul asserted there was no liability at all. The District Court erred in refusing to admit the adverse judgment as evidence impeaching St. Paul's denial of all liability and is proof of reasonably clear liability, as a matter of law.

St. Paul completely ignores *Britton v. Farmers Ins. Group*, 721 P.3d 303 (Mont. 1986), which held that an insurer can consider only admissible evidence in handling a claim under the UTPA. As a matter of law and common sense, inadmissible and prejudicial evidence cannot form the basis of a reasonable investigation or evaluation of a claim. *Graf* certainly did not hold that an insurer is permitted to rely on inadmissible evidence in completely denying the insured's liability. *Britton* held precisely to the contrary and the District Court erred in failing to follow *Britton*.

The District Court erred in not only refusing Peterson's instructions on reasonably clear liability, but in also preventing and precluding Peterson from

arguing that 50-50% negligence constitutes liability and, therefore, reasonably clear liability, as a matter of law. (CR 98). Peterson was even threatened with a mistrial for attempting to rely on the comparative negligence statute as the only proper legal definition of reasonably clear liability there could be. (TR 496-510). The District Court's errors entitle Peterson to a new trial.

ARGUMENT

I. Applicable Standard of Review.

The jury's verdict should be overturned because the District Court failed to apply the proper legal standards to allow the jury to correctly decide the case. Even if there is a legitimate evidentiary dispute about the facts of a case, the District Court still has the duty to properly charge the jury on the applicable law. Contrary to St. Paul's argument, Peterson is not asking the Court to "interfere" with the jury's view of the evidence or review the record for substantial evidence.

Because the District Court committed legal errors which prevented the jury from coming to a correct decision, the appropriate standard of review is *de novo*, where the Court reviews the District Court's decisions to determine if they are legally correct. *Yellowstone Federal Credit Union v. Daniels*, 2008 MT 111, ¶ 11, 181 P.3d 595 (Mont. 2008). The Court should not be sidetracked by St. Paul's attempt to misrepresent the applicable standard of review.

II. 50/50 Negligence Constitutes Reasonably Clear Liability, As a Matter of Law.

St. Paul attempts to confuse matters by misrepresenting the central issue of this case, which is whether St. Paul neglected to attempt in good faith to effectuate a prompt, fair and equitable settlement of Peterson's claim because it knew, from Gregoire's claims file documentation, that Lindberg's liability was reasonably clear. Section 33-18-201(6), MCA. Whether Lindberg's liability had ever become "reasonably clear" was what triggered St. Paul's statutory duty to attempt prompt settlement in the first place.

In the claims file, St. Paul and Gregoire decided, for whatever reason, to express and evaluate Lindberg's liability in terms of percentages of negligence. St. Paul and Gregoire both decided that "apportionment of negligence under MCA §27-1-702" was both legally and factually relevant to the central issue of whether Lindberg was liable and, if so, how much. St. Paul's expert, Gordon Phil, admitted there is no other way to evaluate liability in motor vehicle accident cases other than in percentages of negligence. (TR 779).

Under the UTPA, a finding of negligence by the trier of fact in the underlying case is not necessary. Otherwise, there could never be a bad faith claim in a settled case. Although there was no liability finding by "a" trier of fact in this case, Gregoire admitted that Lindberg was 50% negligent or more and Peterson was not more than 50% negligent. Gregoire, therefore, determined there was not a reasonable basis in law or fact for "contesting", let alone completely denying, Lindberg's liability, but St. Paul did so anyway.

Whereas the jury had compelling proof, from St. Paul's own claims file, that Lindberg was more negligent than Peterson, the District Court inexplicably failed and refused to provide the proper legal standard necessary for a determination of whether such admitted negligence constitutes "reasonably clear" liability under the UTPA. The only possible legal standard for determining reasonably clear liability in an admittedly comparative negligence case such as this, is Montana's comparative negligence statute, § 27-1-702, MCA. The District Court's refusal to make the legal ruling, preliminary or not, that 50/50 negligence constitutes liability, as a matter of law, and perforce, reasonably clear liability, prevented Peterson from receiving a fair trial because the jury had no legal basis upon which to decide the reasonably clear liability issue.

Peterson did not ask the District Court, as St. Paul did in its motions for summary judgment, to rule on the ultimate issue of reasonably clear liability, as a matter of law. Peterson's Motion for Preliminary Legal Ruling (CR 48) did not prevent St. Paul from attempting to convince the jury, contrary to Gregoire's advice, that Lindberg was not 50% or more negligent or that Peterson was 80-90% negligent. It was up to the jury to decide those matters consistent with *Dean v. Austin Mutual Ins. Co*., 869 P.2d 256 (Mont. 1994). But it was certainly not a proper jury function to decide the legal effect of a 50/50 negligence split under the UTPA. The District Court improperly abdicated its responsibility to set the legal ground rules for deciding the

threshold issue of reasonably clear liability, and Peterson is entitled to a new trial.

With all due respect to the District Court, how can a jury in a UTPA case determine if an insurer failed to promptly and fairly settle a claim in which liability was reasonably clear in a negligence case, without the jury knowing that 50/50 negligence constitutes liability, as a matter of law? Unless the UTPA is confined to cases in which liability is not an issue or only 100% negligence cases, a UTPA jury must necessarily consider percentages of negligence admitted in the claims file and must necessarily be told the legal effect of comparative negligence. The District Court's refusal to decide the central legal issue in this case prevented a correct jury determination of the factual issues.

Contrary to St. Paul's argument, the District Court did not "essentially" instruct the jury that 50/50 negligence constituted reasonably clear liability. The District Court flatly refused Peterson's requested instructions to that effect. (Pl's Instrs 11, 53; TR 945-46; 953-54). The Court's instructions said absolutely nothing about 50/50 negligence being liability, as a matter of law, or reasonably clear liability, as a matter of law. The complete failure to rule and instruct on the applicable law regarding reasonably clear liability prevented Peterson from receiving a fair trial.

It is undisputed that the facts in the claims file which compelled Gregoire to conclude Lindberg was 50-70% negligent and pay an $850,000 judgment

never changed from the day of the accident. (TR 268; 305-07; 669-70). Yet, St. Paul still denied any and all liability and forced three years of expensive and protracted litigation which the UTPA is designed to avoid.

By St. Paul's own admission, the District Court's failure and refusal to rule that 50% negligence, or anything greater, constitutes reasonably clear liability, as a matter of law, improperly allowed Gregoire to convince the jury that "subjective" factors other than negligence were determinative in triggering St. Paul's duties under the UTPA. Gregoire's total reliance on such subjective factors and St. Paul's complete disavowal of Gregoire's 50-70% negligence determination was, in itself, bad faith. The District Court's erroneous rulings facilitated St. Paul's ability to improperly convince the jury that Gregoire's determination of Lindberg's 50-70% negligence was legally inconsequential.

If the District Court would have properly ruled on the 50/50 negligence issue, the jury would have known this was not a contested liability case and that Gregoire's testimony that, paradoxically, he could achieve a "complete defense verdict" was legally impossible and inconceivable. Since 50/50 negligence constitutes liability, as matter of law, the District Court's refusal to so rule and instruct the jury allowed St. Paul and Gregoire to deny liability which was, by their own admission, undeniable.

The *Giambra* case is not applicable here, where, in the claims file, Gregoire admitted 50-70% negligence, which constitutes liability, as a matter of law. There was no such admission of liability by the insurer in the

declaratory judgment action in *Giambra* because the claims file had not yet been discovered. In this case, the District Court ignored St. Paul's and Gregoire's admission of reasonably clear liability and Peterson's right to a fair trial was severely prejudiced.

The UTPA was enacted to prevent the precise conduct perpetrated by St. Paul in this case. When an insurer and its hired counsel admit the insured is liable, as a matter of law, under Montana's comparative negligence statute, the insurer is required to attempt a prompt, fair, and equitable settlement and not deny any and all liability in an attempt to starve out the injured claimant. To rule otherwise will emasculate the UTPA and confine its application only to 100% liability cases. That was never the legislature's or this Court's intent and St. Paul's misguided effort to change the intent and purpose of the UTPA should be rejected.

III. The Offer of Judgment Contradicted St. Paul's Denial of Any and All Liability.

St. Paul's argument that its Offer of Judgment and subsequent entry of judgment were "intended" to "settle" a "contested" claim is in error. Unlike a settlement agreement, which is governed by general contract principles, such as a "meeting of the minds," an offer of judgment is not a negotiated matter. *Sturgeon v. East Bench Irrigation District*, O.P. 09-0595, p. 2. Once an offer of judgment is accepted, judgment is entered and no meeting of the minds or determination of intent or meaning is required.

The legal effect of a judgment entered pursuant to an offer of judgment is the same as any other judgment, i.e., it resolves all liability issues adversely to the offering defendant. A judgment by stipulation or consent is as binding as any judgment or verdict, no more or less. *Schillinger v. Brewer*, 697 P.2d 919, 922 (Mont. 1985). *See also*, *Jones v. Hubbard,* 740 A.2d 1004, 1014 (Md. 1999) (consent judgment no less than a judgment resulting from a jury verdict in a hotly contested adversary proceeding). Even though a Rule 68 judgment may be useful in resolving litigation, it is not legally the same as a "negotiated" settlement wherein the defendant is allowed to deny liability.

St. Paul admits that by making the $850,000 Offer of Judgment it became "liable" and the judgment was enforceable against it. Peterson's federal court judgment against St. Paul was entitled to *res judicata* and full faith and credit in Montana state courts. *See, Supreme Lodge, K.P. v. Meyer,* 265 U.S. 30 (1924). The only thing which made the judgment enforceable was the fact that it resolved all liability issues adversely to St. Paul.

Since a judgment entered pursuant to Rule 68 is as binding as any other judgment or jury verdict, St. Paul cannot dispute that Peterson's judgment likewise foreclosed any argument that Lindberg's liability was not reasonably clear. The District Court erred in not ruling and instructing the jury that St. Paul's Offer of Judgment constituted an admission of reasonably clear liability, as a matter of law.

At the very least, the judgment should have been admissible to impeach and contradict St. Paul's complete denial of any and all liability. Throughout the handling of Peterson's claim, St. Paul took the position there was absolutely no negligence or liability at all on the part of Lindberg. (Pl's Exh 22, TR 359-60). Secretly, however, St. Paul's claims file concluded that Lindberg was guilty of half or more of the negligence.

St. Paul's offer of an adverse judgment certainly repudiated and contradicted its position that Lindberg was not at all liable. The District Court erred in not only refusing to enforce the judgment as an admission of reasonably clear liability, but in also preventing Peterson from using it to impeach St. Paul's position that Lindberg was not at all negligent or liable. Either way, the District Court erred and Peterson is entitled to a new trial.

IV. Gregoire Acted as St. Paul's Agent.

St. Paul's assertion that Peterson offered "no evidence" of Gregoire's agency status is incorrect and misleading for two reasons. First, the District Court granted St. Paul's second Motion for Summary Judgment and ruled that "the plaintiff will not be allowed to present evidence or argue that Mr. Gregoire is the agent of the insurer." (CR 98, ¶ 2(d), p. 2). Peterson was precluded, therefore, from offering evidence contrary to the District Court's legal ruling.

Second, there was uncontradicted evidence that Gregoire's actions were being controlled by St. Paul. St. Paul controlled who would defend the case by rejecting Omimex's choice of Steve Lehman and insisting on Gregoire. St.

Paul also told Gregoire, at the outset, that he could "not take any actions in connection with the handling of this lawsuit unless you have our specific authorization." (Pl's Exh 19; TR 265-67). By failing and refusing to give any instructions on the agency issue, the District Court prevented the jury from deciding the agency issue for which there was substantial evidence supporting Peterson's position.

The fallacy with St. Paul's argument is that defense counsel can make liability admissions which are binding on the insurer and still give "undivided loyalty" to the insured. After a lawsuit is filed, the defense must be conducted by an attorney hired to defend the insured and if the duties under the UTPA are continuing, as held in *Palmer v. Farmers Ins. Exchange*, 861 P.2d 895 (Mont. 1993), then liability admissions made by defense counsel must be attributable to the insurer.

There is nothing inconsistent or contradictory in requiring defense counsel to give "undivided loyalty" to the insured and making the insurer legally responsible for the liability admissions made by defense counsel during the course of handling the claim. St. Paul strenuously asserts Gregoire gave his undivided loyalty to Lindberg, but he still advised St. Paul that Lindberg would be found 50-70% negligent and Peterson would not be found more than 50% negligent. Yet, the District Court allowed St. Paul to escape responsibility under the UTPA.

The District Court should have instructed the jury that Gregoire's admissions of liability were binding on St. Paul. The District Court's failure and refusal to do so improperly allowed St. Paul to shift its responsibilities under the UTPA to a nonparty, which greatly prejudiced Peterson's right to a fair trial.

V. Prejudicial and Inadmissible Evidence.

St. Paul does not dispute, nor could it, that evidence of lack of traffic citations, Sons' opinion as to point of impact, and Peterson's prior driving record was ruled inadmissible and prejudicial by Judge Haddon in the underlying federal court litigation. (CR 58, 59). It is likewise undisputed that the Montana cases on which Judge Haddon based his rulings were in existence long before St. Paul's handling of Peterson's claim.

In 1988, this Court decided, in *Smith v. Rorvik*, 751 P.d 1053, 1056 (Mont. 1988), that admitting evidence of the lack of traffic citations constitutes prejudicial error. *See also*, *Hart-Anderson v. Hauck*, 781 P.2d 1116 (Mont. 1989). St. Paul knew more than a year and a half before Judge Haddon ruled in May 2007 that Montana law prohibited evidence of the lack of traffic citations and unsupported highway patrol opinions.

St. Paul also knew that in 1986 this Court decided *Britton,* which held that an insurer cannot rely on inadmissible and prejudicial evidence in denying a claim and that such reliance is "not within the bounds of the duty of good faith." *Id.* at 315-16 (emphasis added). Under these circumstances, St. Paul's

argument that it did not know the evidence was inadmissible at the time it was "considered" in 2004 borders on the absurd.

The District Court manifestly abused its discretion in allowing the jury to consider evidence which had already been ruled inadmissible and prejudicial by a federal district court judge applying long-standing Montana law in a diversity case. Judge Haddon excluded the evidence because it was not admissible on the issue of liability. Yet the District Court inexplicably held that St. Paul was entitled to rely on that same evidence for purposes of disproving liability. In doing so, the District Court ruled directly contrary to *Britton* and acted arbitrarily and beyond the bounds of reason.

Finally, St. Paul's assertion that *Graf* overruled *Britton* and that an insurer can legitimately rely on any information in its claims file, no matter how prejudicial or inadmissible, is without merit. There is no question that St. Paul did not merely utilize the inadmissible evidence to indirectly develop admissible evidence. Lindberg's reasonably clear liability was the key issue at trial and St. Paul admits it directly utilized and relied on the inadmissible evidence to completely deny Peterson's claim. St. Paul was permitted to argue that because Patrolman Sons decided not to issue any traffic citations, Lindberg could not have been negligent at all. The District Court erred and Peterson is entitled to a new trial.

VI. Jury Instructions.

The District Court's erroneous pretrial legal rulings led directly to its failure and refusal to properly instruct the jury on critical areas of Peterson's case. Proper instructions may have "cured" the erroneous and prejudicial effect of the District Court's pretrial rulings, but the refusal and failure to give such instructions only perpetuated the pretrial error. Although failure to instruct is reviewed for abuse of discretion, the pretrial legal errors which precipitated such failure are reviewed *de novo*.

The District Court failed to give any instructions at all on Gregoire's role as defense counsel and, therefore, St. Paul's argument that the instructions, as a "whole," properly covered the issue is disingenuous. The District Court erred in ruling that St. Paul could not be bound by Gregoire's admissions of liability and its failure to cure that erroneous pretrial ruling with proper jury instructions only perpetuated the error. Peterson is entitled to a new trial with proper jury instructions.

Likewise, the Court's erroneous pretrial legal rulings caused it to refuse Instruction 57 on the Offer of Judgment. As argued above, an offer of judgment is not a negotiated matter, but the clear intent of the judgment was to prevent St. Paul from denying liability in a standard defense release. (Pl's Exh 92; TR 280-81). The jury should have been instructed that the judgment constituted an admission of liability and, therefore, reasonably clear liability, and the District Court erred in refusing to do so.

By offering Instructions 59 and 62, Peterson gave the District Court the opportunity to correct its erroneous pretrial ruling allowing St. Paul to rely on inadmissible and prejudicial evidence of the lack of traffic citations. Even though Lindberg did not violate the 70 mph statutory speed limit, the jury still could have determined his liability was reasonably clear for violating the reasonable and prudent speed rule. The District Court erred in refusing to give that instruction.

Peterson's instructions "pertained" to St. Paul's violation of the UTPA, since they governed the issue of Lindberg's reasonably clear liability. Instructions were necessary to correct the District Court's failure to follow *Britton*. Whereas Peterson was severely prejudiced by the District Court's decision to ignore *Britton*, he was doubly prejudiced by the Court's refusal to give the ameliorating instructions. Such prejudice requires a new trial.

CONCLUSION

The District Court's numerous legal and evidentiary errors prevented Peterson from receiving a fair trial and a new trial is required.

ST. PAUL'S CROSS-APPEAL

I. Summary Judgment Was Properly Denied.

St. Paul's first Motion for Summary Judgment (CR 10), was properly denied because the claims file had not yet been produced and St. Paul had already admitted Lindberg's reasonably clear liability by agreeing to an adverse judgment for $850,000. Since the propriety of an insurer's claims handling must be assessed by the contents of the claims file, *Graf, supra*, at 27, ¶ 17, summary judgment was improper without first examining the claims file.

St. Paul's second Motion for Summary Judgment, (CR 56), was properly denied because the claims file admitted Lindberg was 50-70% negligent, establishing "reasonably clear" liability, as a matter of law. The liability facts were not "contested" to the extent that St. Paul admitted Lindberg's reasonably clear liability. The District Court did not err in denying St. Paul's motions for summary judgment. The District Court erred in not ruling that Lindberg's liability was reasonably clear, as a matter of law.

II. Rick Anderson's Testimony.

The District Court did not abuse its discretion in allowing Rick Anderson's expert testimony. The jury was repeatedly cautioned that Mr. Anderson was not testifying on the law and that the Court would instruct on the applicable law. (TR 251-52; 319-20). Any statements of legal opinion were voluntarily elicited by St. Paul on cross-examination. (TR 389-90). Any challenges to Mr. Anderson's qualifications went to the weight of his

testimony, not its admissibility. The standards to which Mr. Anderson testified were "revised" at St. Paul's insistence and it cannot now claim the revised standards were not disclosed. The only way this Court has any reason to discuss Mr. Anderson's testimony on cross-appeal is if the case is remanded for a new trial. St. Paul admits, therefore, that the District Court erred and a new trial is required.

III. Denny Lee's Proposed Testimony.

The District Court provided an exhaustive and correct analysis of why Denny Lee was not permitted to testify at trial. (TR 932-35). Either his testimony would have been cumulative of what was already in the claims file or new information and, therefore, irrelevant to what St. Paul relied on at the time it was handling the claim. Either way, Lee's proposed testimony would have introduced error into the record and the District Court properly rejected it. (TR 935).

CONCLUSION

St. Paul's cross-appeal is without merit and should be rejected.

DATED this 29th day of January, 2010.

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CERTIFICATE OF SERVICE

I do hereby certify that on this 29th day of January, 2010, I mailed a true and correct copy of the above and foregoing through the United States Postal Service, postage prepaid, to the following:

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CERTIFICATE OF COMPLIANCE

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DATED this 29th day of January, 2010.

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